Supreme Court, U.S.
FILED
JAN 20 1998
CLERK

No. 97-42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Eastern Enterprises,

Petitioner,

v.

Kenneth S. Appel, Commissioner of Social Security, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

Brief *Amicus Curiae* of Freeman United Coal Mining Company in Support of Respondents

KATHRYN S. MATKOV
Counsel of Record
JOHN A. WASHBURN
BRIAN B. GILBERT
GOULD & RATNER
222 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 236-2003

Counsel for Amicus Curiae

January 20, 1998

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF FACTS 2

ARGUMENT 4

A. THE COAL ACT WITHSTANDS SCRUTINY UNDER THE DUE PROCESS CLAUSE BECAUSE IT RATIONALLY ALLOCATES THE FINANCIAL BURDENS OF FUNDING UMWA BENEFITS AMONG THOSE PARTIES WHO MOST LOGICALLY SHOULD BEAR SUCH COSTS—THE FORMER EMPLOYERS WHO PARTICIPATED IN THE CREATION OF THE COAL INDUSTRY'S MULTI-EMPLOYER RETIREE BENEFITS SYSTEM 4

1. Pre-Coal Act History of Coal Industry Provided Rationale for Adoption of the Coal Act 4

2. Coal Act Is a Rational Response to the Problems Faced by the Coal Industry, Combined Fund and Prior Fund Beneficiaries 6

B. THE IMPOSITION OF LIABILITY UNDER THE COAL ACT ON PETITIONER IS NOT A "TAKING" UNDER THE JUST COMPENSATION CLAUSE 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases PAGE

Blue Diamond Coal Co., In Re, 79 F.3d 516 (6th Cir.), cert. denied, 117 S. Ct. 682 (1996) .. 10

Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) 10

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 8

Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996) ... 11

Chateaugay Corp., In Re, 53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995) 8, 10, 11

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 4

United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir.), cert. denied, 108 S. Ct. 146 (1986) 10

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 4, 8

Statutes

The Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C.A. § 9701-22 (West Supp. 1997) 1

Miscellaneous

Coal Commission Report: A Report to the Secretary of Labor and the American People (Nov. 1990) 5, 6, 7, 9

STATEMENT OF INTEREST[1]

The *amicus*, Freeman United Coal Mining Company ("Freeman"), and its predecessors have been mining coal in Illinois since 1872. Freeman, which is a subsidiary of General Dynamics Corporation, currently operates two deep mines and one surface mine in the Central Illinois basin, and produces approximately 4.5 million tons of coal annually. The Company employs approximately 500 people in the State of Illinois. Although Freeman is not presently a member of the Bituminous Coal Operators Association ("BCOA") or a signatory to the new 1998 National Bituminous Coal Wage Agreement ("NBCWA") with other BCOA members, Freeman and its predecessors were until recently members of the BCOA and were signatories to all previous NBCWA's executed through and including the 1993 NBCWA.

Prior to the implementation of *The Coal Industry Retiree Health Benefit Act of 1992*, 26 U.S.C.A. § 9701-22 (West Supp. 1997) (the "Coal Act"), Freeman contributed to the UMWA 1950 Benefit Plan and Trust and the UMWA 1974 Benefit Plan and Trust and the predecessor UMWA Welfare and Retirement Fund of 1950 ("Prior Funds").

Freeman experienced adverse economic conditions in the late 1980's and early 1990's as a result of a change

---

[1] Counsel for all parties have consented to the filing of this amicus brief, and *amicus* has filed those consents with the Clerk of this Court in accordance with Rule 37.3. No person other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief. Rule 37.6. The brief was not authored in whole or in any part by counsel for a party. Rule 37.6.

in the demand for Illinois basin coal and the soaring costs of required contributions to the Prior Funds. These soaring costs were a direct result of severe inflation in health costs and the shrinking universe of companies in the coal industry available to fund these costs. The Coal Act was a direct response to this dilemma faced by Freeman and other similarly situated companies to insure that bargained-for benefits guaranteed to the beneficiaries of the Prior Funds would be paid despite insufficient contributions.

The *amicus* agrees with Respondents that the Coal Act (a) is a rational exercise of Congress' legitimate authority and thus withstands scrutiny under the Due Process Clause, and (b) does not constitute a taking of property under the Just Compensation Clause.

STATEMENT OF FACTS

Freeman was created by the merger of Freeman Coal Company and United Electric Coal Companies in 1975. At the height of its operations in 1982, Freeman operated eight (8) coal mines and produced coal at a rate of nearly eight million tons per year. As a signatory to previous NBCWAs, Freeman made contributions to the Prior Funds from their inception. Prior to the Coal Act, Freeman's contributions to the Prior Funds were based upon an assigned hourly rate multiplied by the number of man hours worked by UMWA miners for the applicable period and/or a contribution rate per ton of coal produced. Between January of 1988 and January of 1993 when the Coal Act was implemented, Freeman's hourly contribution rate increased from $1.91 to $3.67. This constituted a staggering increase of in excess of 92% during

this five (5) year period. As the Coal Commission found, this increase was the direct result of soaring health costs and fewer responsible operators in the coal industry available to fund these costs. Before the adoption of the Coal Act, Freeman was also required to pay benefits costs for individuals that were never employed by Freeman.

This increase in contribution rates occurred during a time when Freeman was experiencing financial pressures due to the fact that markets for Illinois basin coal were shrinking as a result of Clean Air Act legislation and increasing competition from Western coal sources.

Under the Coal Act, Freeman is currently assigned 796 beneficiaries covered by the UMWA Combined Fund ("Combined Fund"). Freeman's contributions in the current year will total $1,791,289.68, which will constitute approximately a 50% decrease from the contributions Freeman was making to the Prior Funds prior to the Coal Act. Although health costs continue to soar, the beneficiaries assigned to Freeman all constitute former employees of Freeman and their dependents. At present, Freeman is paying for its own employees and former employees, not for those of other companies, like Eastern, whom by their own volition have chosen to no longer operate in the coal industry.

An increase in Freeman's required fund contributions to the pre-Coal Act levels, in the face of the difficulty of surviving any extended strike and shutdown at this time similar to that experienced by The Pittston Company in 1992 over issues related to benefits contributions, could threaten the future viability of the company.

ARGUMENT

A.

THE COAL ACT WITHSTANDS SCRUTINY UNDER THE DUE PROCESS CLAUSE BECAUSE IT RATIONALLY ALLOCATES THE FINANCIAL BURDENS OF FUNDING UMWA BENEFITS AMONG THOSE PARTIES WHO MOST LOGICALLY SHOULD BEAR SUCH COSTS—THE FORMER EMPLOYERS WHO PARTICIPATED IN THE CREATION OF THE COAL INDUSTRY'S MULTI-EMPLOYER RETIREE BENEFITS SYSTEM

To succeed on its claim, Petitioner must establish that Congress "acted in an arbitrary and irrational" manner *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) in enacting the Coal Act. If the Coal Act:

> "is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

Even where a statute is applied retroactively or has retroactive effects, such legislation should be upheld if "the legislation is itself justified by a rational legislative purpose." *Id.* at 730.

1. Pre-Coal Act History of Coal Industry Provided Rationale for Adoption of Coal Act

A review of the history of the coal industry over the period of time from the 1940's to the passage of the Coal Act does show that Congress was neither arbitrary nor irrational in enacting this legislation. Petitioner and certain of its amici would like this Court to forget this history and conclude that each NBCWA was negotiated

in a vacuum for a finite period of years without any view toward the future or any expectation of ongoing responsibility on behalf of coal operators. This view of the industry is jaundiced and inaccurate.

As the Coal Commission found, the provision of health and welfare benefits to miners has been a critical issue for labor and management since the 1940's. *Coal Commission Report: A Report to the Secretary of Labor and the American People* (Nov. 1990) at 29. With the shutdown of the coal industry in the 1940's, the UMWA made it clear that its members would no longer report to work without the provision of health and welfare benefits to miners and their dependents. Although, as Petitioner points out in its brief, the NBCWA's contained provisions regarding the revocation, termination or amendment to benefits, *Brief for Petitioner* at 5, *amicus* believes that it was clear to every company operating in the industry that subsequent NBCWAs or other agreements with the UMWA would inevitably provide for retiree medical benefits, in some form or another, for miners and their dependents. For Petitioner to claim that it exited the coal industry in 1965 without any inkling that such benefits would remain a part of the NBCWA package is simply disingenuous.

It must be remembered that the UMWA Welfare and Retirement Fund of 1946 ("1946 W&R Fund") instituted the first union health and welfare fund. The Krug-Lewis Agreement which created the 1946 W&R Fund was reached only after a protracted and bitter strike in which control of the mines was assumed by the Federal government. Succeeding NBCWAs modified and furthered the concept of a funded health and welfare fund. Although each preceding NBCWA had contained provision for the

funding of these benefits, the 1978 NBCWA finally codified what the industry had been pointing towards for many years—an assurance of health care to "orphaned" miners (retired miners whose last employer was no longer in business or otherwise ceased contributing to the funds) and an obligation of signatories to maintain benefits and to continue to contribute so long as the operator remained in business (the so called "evergreen clause"). In fact, the Coal Commission found that guaranteed health care benefits for miners had, many years previous to the 1978 NBCWA, already become a well entrenched expectation of miners and their dependents. *Coal Commission Report* at 1.

The crisis that lead to the adoption of the Coal Act was caused by a multitude of factors, the most significant being the increasing cost of health care coupled with the continuing contraction of the coal industry. *Coal Commission Report* at 2. Given the number of miners and dependents receiving benefits under the Prior Funds, the increasing cost to provide such benefits and the shrinking base of companies available to fund such costs, it became clear that something needed to be done. The Pittston strike in 1992 brought these issues to a head and Congress stepped in to investigate the crisis and develop a solution.

2. The Coal Act Is a Rational Response to the Problems Faced by the Coal Industry, Combined Fund and Prior Fund Beneficiaries

Congress was faced with the prospect of either (a) doing nothing, which would have increased the chaos in the coal industry, led to more strikes, left in excess of

100,000 individuals without health coverage and potentially crippled the coal industry, or (b) devising a plan to fund these benefits through the natural life cycle of the Prior Funds. Congress investigated several mechanism's including an industry wide assessment or the "pay for your own" plan that it eventually adopted. *Coal Commission Report* at 61-69.

By assigning fund beneficiaries to current and former NBCWA signatories who employed such beneficiaries, Congress selected a scheme that was fair and equitable. Responsibility for the payment of benefits would at least fall on companies that had a clear nexus with the covered individuals and profited from the employment of such individuals while they were members of the work force. In addition, by creating a tiered approach for the assignment of beneficiaries, Congress insured not only that plan beneficiaries would be assigned to the company that had the strongest nexus with such beneficiary, but also that the number of unassigned beneficiaries would be kept to a minimum. This would reduce the burden placed on existing coal operators to fund the costs of these unassigned beneficiaries, which was one of the primary causes of the crisis in the first place. The resulting framework is certainly more rational than the Petitioner's "solution" which, if accepted, would increase the number of "orphaned" miners and shift the cost of paying health benefits for such miners and their dependents to companies, like Freeman, that never employed, and had no connection whatsoever with, such miners.

Perhaps, a better scheme could have been developed by Congress, although it is difficult to imagine what such a system might look like. Nevertheless, to withstand Due Process scrutiny, Congressional solutions need only be

rational and not arbitrary. *Turner Elkhorn,* 428 U.S. at 19. Clearly, given the historical background and the problems identified to be resolved, the Coal Act is a rational response.

B.

THE IMPOSITION OF LIABILITY UNDER THE COAL ACT ON PETITIONER IS NOT A "TAKING" UNDER THE JUST COMPENSATION CLAUSE

Three factors are of particular significance in determining the existence of a Fifth Amendment "taking": (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulatory action interferes with reasonable investment-backed expectations; and (3) the character of the government action. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986).

With respect to economic impact, the appropriate "yardstick of economic impact is proportionality." *In Re Chateaugay Corp.*, .53 F.3d 478 (2d Cir.), cert. denied, 116 S. Ct. 298 (1995). As discussed above, the framework adopted by the Coal Act is a perfectly proportional scheme. Stated simply, each coal operator or former coal operator that were signatories to NBCWAs are required to pay for their own former employees and their dependents. Beneficiaries that are unassigned are paid for proportionately by all contributors to the fund. This places liability for funding exactly where it should be, on those companies that employed the fund beneficiaries and who participated as employers in the creation of the multi-employer benefit system. In contrast, the pre-Coal Act scheme was grossly disproportionate in that it placed liability for all beneficiaries on the few remaining companies in the coal industry, even though they had no nexus with these beneficiaries.

Petitioner argues that proportionality is not served since Petitioner did not "contribute to the financial problems of the Benefit Plans" or promise lifetime health benefits to miners. *Petitioner Brief* at 42. Petitioner conveniently divorces itself from this class of companies, ignoring the fact that the crisis in the funds is not something that developed over night but had its roots back in the days when Petitioner and others participated as contributor in the creation of the multi-employer benefits system. See *Coal Commission Report* at 29. Funding has always been an issue for health and welfare benefits since the 1940's. As stated earlier, at the time Eastern and other operators left the BCOA, it was only reasonable to expect that the continuation of these benefits for miners in the future would be a linchpin of any management/labor compact. The main cause of the ensuing financial crisis was increasing health care costs coupled with fewer companies available in the coal industry to bear these costs. *Coal Commission Report* at 2. These developments did not arise as a result of any act of Freeman or the BCOA. Petitioner wants to retain all of the benefits from coal operations and earlier NBWCA's (such as the receipt of significant dividends from EACC over the years), but does not want to bear any corresponding responsibility. Thus, Petitioner's position favors disproportionality and is consequently inequitable.

Certain of Petitioner's *amici* argue that the Coal Act is a "taking" because certain of the former operators affected by the Coal Act cannot afford to make the payments required thereby. See *Brief Amici Curiae of Unity*

Real Estate Company, et al. Yet, as long as the Coal Act's application is proportionate, as is demonstrably the case, it should withstand scrutiny under the "takings" clause. Similar requirements of funding or cost sharing under the Multiemployer Pension Plan Amendments Act and the Comprehensive Environmental Response, Compensation Liability Act of 1980 have not rendered such statutes unconstitutional. See *Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993); and *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir.), cert. denied, 108 S. Ct. 146 (1986) at 734.

With respect to the second prong of the "takings" analysis, Petitioner argues that there was no way to foresee the Coal Act, the guarantee of lifetime benefits or the imposition of liability on former employees. As discussed above, however, Petitioner simply ignores history including the importance of the coal industry to the national economy, the fact that miners clearly would not stand for operators not providing these benefits (as evidenced by the 1940's shutdown and the negotiation of each NBCWA since), and the Federal government's willingness to get involved to insure health care benefits for retired miners. *In Re Chateaugay Corp.*, 53 F.2d at 495-496; *In Re Blue Diamond Coal Co.*, 79 F.3d 516 at 525-526 (6th Cir.), cert. denied, 117 S. Ct. 682 (1996).

Finally, the Coal Act was enacted by Congress in response to labor disputes in the coal industry to avoid disruption of interstate commerce and to insure that a significant group of individuals, who had reason to expect a different result, are not left without privately

funded health care benefits (which, if this occurred, would certainly increase the burden on the government and the rest of the country to fund these costs). The Coal Act is intended to promote the common good by "adjusting the benefits and burdens of economic life" and is therefore not the type of governmental action that would be deemed a "taking" of property. *In Re Chateaugay Corp.*, 53 F.2d at 496, *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), cert. denied, 117 S. Ct. 50 (1996).

CONCLUSION

The judgment of the United States Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

KATHRYN S. MATKOV
Counsel of Record
JOHN A. WASHBURN
BRIAN B. GILBERT
GOULD & RATNER
222 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(312) 236-2003

Counsel for Amicus Curiae

January 20, 1998